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No. _____

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

October Term, 1989

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

vs.

THOMAS E. TAYLOR,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

FRANK A. ALOI, ESQ.
Counsel of Record
2507 Browncroft Boulevard
Suite 202
Rochester, New York 14625
(716) 381-5310
(716) 624-3932

Attorney for the Petitioner

SAMUEL F. PRATO, ESQ.
Co-Counsel for Petitioner
80 St. Paul Street
Suite 531
Rochester, New York 14604
(716) 325-5900

Batavia Times Publishing Co.
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Questions Presented For Review

I. Whether Or Not The Court Of Appeals Of The State Of New York In Denying Leave To Appeal The Judgment Of Conviction Affirmed By The Appellate Division, State Of New York, Fourth Judicial Department, Improperly Applied And Relied Upon *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1882), In Admitting Into Evidence Certain Double Hearsay Evidence Which Proved To Be The Pivotal Testimony Against The Petitioner In A Purely Circumstantial Evidence Prosecution.

II. Whether Or Not Petitioner Was Deprived Of Exclusive, Effective, And Committed Representation Of Counsel In The Affirmed Ruling Of The Trial Court Not To Permit Him To Retain New Counsel After Disclosures On The Record To The Trial Justice Outside Petitioner's Presence That His Attorney Had In A Contemporaneous And Unrelated Prior Prosecution Represented A Criminal Defendant And Defended In Part Based Upon Direct Statements On The Record Of Alleged Criminal Conduct By The Petitioner, Conduct Characterized By The Trial Justice As Evidence That Counsel Had Not Treated Petitioner "Too Kindly In Those Proceedings".

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October Term, 1989

THE PEOPLE OF THE STATE OF NEW YORK,
Respondents,

vs.

THOMAS E. TAYLOR,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

The Petitioner, Thomas E. Taylor, prays that a writ of certiorari issue to review the final Order and Judgment of the Court of Appeals of the State of New York denying petitioner leave to appeal his affirmed judgment of conviction for Murder in the Second Degree.

OPINIONS BELOW

The Memorandum Opinion of the Appellate Division of the Supreme Court, State of New York, Fourth Judicial Department, dated November 15, 1989, is at present unreported and appears as #1 of petitioner's Appendix.

The Certificate of the New York State Court of Appeals denying leave to appeal the affirmed judgment of conviction dated January 24, 1990, is unreported, and appears as #2 of petitioner's Appendix.

JURISDICTION

The final Order of the Court of Appeals of the State of New York, denying petitioner leave to appeal his judgment of conviction is dated January 24, 1990. This Petition for a Writ of Certiorari is filed timely within ninety (90) days thereof. The jurisdiction of this Honorable Court rests upon 28 U.S.C., section 1254, and Rule 10 of this Court.

CONSTITUTIONAL AND FEDERAL PROVISIONS INVOLVED

"No person shall be deprived of life, liberty, or property, without due process of law . . . ." [Fifth Amendment]

"In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense." [Sixth Amendment]

"No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law . . . ." [Section 1, Fourteenth Amendment]

The rule of evidence governing the admissibility of hearsay statements of third person intent contained in *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1882), hereinafter "Hillmon".

STATEMENT OF THE CASE

Petitioner was twice prosecuted for complicity in the alleged murder of one John Fiorino. In both cases the principal Prosecution evidence was essentially the same: the testimony of an informant, an admitted career criminal, for whom lying in the past had concededly become a survival tactic, Louis DiGiulio, who stated that petitioner hired an alleged professional hit-man, one Joseph John Sullivan, to murder John Fiorino. In both cases, the principal defense testimony was essentially the same: the testimony of one Robert Hawley, a person with absolutely no relationship whatsoever to the petitioner or any of the other principals or witnesses in the case, who stated that DiGiulio confided in him while both were incarcerated in the period preceding DiGiulio's trial testimony, that petitioner "had nothing to do with the killing of John Fiorino", and that petitioner was an innocent victim of his plea bargain, "because that's the way it has to be". In the first trial, Lida Fiorino, the wife of the victim, was not permitted to testify to a certain telephone conversation her husband allegedly had immediately preceding his exodus from their apartment to drive to a suburban restaurant where he was shot dead in the parking lot allegedly by Joseph John Sullivan. At a side bar in the first trial, the Trial Justice was advised that Lida Fiorino would testify that her husband had advised her after the telephone conversation that he was "going to see the eagle", allegedly the nickname for petitioner. The Trial Justice correctly perceived the peril in admitted that testimony, specifically, the possibility that it would not only be deemed evidence of John Fiorino's statement to his wife, but also of petitioner's actions and intentions that potentially flowed from the statement, namely, that he lured John Fiorino to the meeting for his date with

destiny.[1] Without Lida Fiorino's testimony in the first trial, the Prosecution was unable to obtain a conviction. The jury could not reach a unanimous verdict, and a mistrial was declared.

Prior to the second trial, it was agreed between counsel and the Trial Justice that the prior evidentiary rulings would govern.[2] In addition, notwithstanding the disclosure to the Trial Justice that petitioner's attorney had stated on the record in an unrelated prosecution incidents of petitioner's alleged criminal conduct in defense of another client, and the Trial Justice's statement to counsel that he had not treated his client very kindly[3] in that prosecution, the Trial Justice refused when all the facts concerning the obvious conflict of interest were finally disclosed to petitioner and petitioner requested a mistrial, to a least relieve petitioner's attorney and grant petitioner a continuance for purposes of obtaining substitute counsel. Petitioner was forced to trial with an attorney then not of his choosing who had stated publicly that petitioner was guilty of serious criminal conduct.

Notwithstanding the evidence ruling agreement in the preliminary stages of the second prosecution, when the issue of Lida Fiorino's testimony again arose, the Trial Justice in the second trial declined to follow the evidentiary ruling in trial number one, and admitted Mrs. Fiorino's hearsay testimony on the authority of *Hillmon*. Petitioner was thereafter convicted of a charge contained in Indictment No. 433/82 of one count of Murder in the Second Degree in violation of Sections 20.00 and 125.25(1) of the Penal Law of the State of New York. On April 9, 1985, the Appellant was sentenced to an indeterminate sentence of imprisonment with a minimum of 25 years and a maximum of life, a sentence he is now serving at the Attica Correctional Facility.

[1] See Petitioner's Appendix, #3, 1st Trial transcript excerpts.
[2] 2nd Trial, Transcript, Vol. I, 9/5/84, pp. 4-7.
[3] 2nd Trial, Chambers Confr. 11/23/84; Transcript, Vol. VI, pp. 10-13. Transcript, Vol. VI, pp. 165-167, 2/20/85.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT

Review by certiorari is appropriate in the case at bar under Rule 10, subparagraphs 1(b), and 1(c), specifically that a state court of last resort has decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals, and has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way that conflicts with applicable decisions of this Court.

ARGUMENT

I. Federal Courts Of Appeal And The Highest Courts Of Several Of The States Are Split On The Hillmon Hearsay Rule. The Hillmon Hearsay Rule Has Been Both Followed And Repudiated In The Decisions Of United States Courts Of Appeals; Likewise, The Highest Courts Of Several Of The States, New York Included, Are Split As To The Propriety Of The Hillmon Rule. In The Instant Case, When The Court In The First Trial Declined To Follow Hillmon And Admit The Testimony Of Lida Fiorino, The Jury Could Not Reach A Unanimous Verdict. When The Court In The Second Trial Followed Hillmon And Admitted The Lida Fiorino Testimony, Petitioner Was Convicted. It Is Respectfully Submitted That Petitioner Has Been Victimized By What In Effect Is Judicial Lottery, A Practice And Procedure Entirely Alien To Our Notion Of Procedural Fairness And Due Process. It Is Therefore Essential That This Court Reconsider Hillmon And Once And For All Settle Its Scope And Applicability, Especially In Criminal Cases.

THE TESTIMONY OF LOUIS DI GIULIO:[4] The principal testimony against petitioner was that of Louis DiGiulio, a career criminal, and for the most part, an unsuccessful one at that. DiGiulio was conceded by the People in Summation, and by the Trial Court in its Jury Charge to be a thoroughly unsavory character. Despite the fact that DiGiulio came up with his story to implicate Thomas Taylor in the slaying of John Fiorino months after the occurrence [DiGiulio was arrested on December

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[4] 2nd Trial, Transcript, Vol. VI, pp. 480-493 (the Fiorino shooting); Transcript, Vol. VI, p. 558 (DiGiulio's deal); Transcript, Vol. VI, pp. 377-411, 414-421, 423-425 (prelude, Sullivan's arrival), pp. 469-470 (the plan); and pp. 473, 480.

17, 1981, the night Fiorino was killed; his plea deal was not cut until the end of the first week in June, 1982], presumably agreeing to cooperate to escape a murder charge, DiGiulio's testimony, concededly the rankest informant's testimony possible, and questionable though it was, became the best the Prosecution could muster.

According to DiGiulio, John Fiorino was a "captain" in the Rochester mafia [the local organization allegedly headed by Red Russotti, Rene Piccaretto, and Richard Marino], a group embroiled in a power struggle with an insurgent faction that allegedly included petitioner and others. Certain dissident "gambling joints" controlled by the insurgent faction refused to pay the weekly "vig" extorted by the mob, and John Fiorino allegedly became a man caught in the middle: told by his mob bosses to "collect" the vig or close down the upstarts, while at the same time talking to and cajoling the dissidents to "cooperate" and keep the lid on the Rochester rackets. It was DiGiulio's story that the dissidents allegedly determined to take a "slap" at the local mob and send it a "message" by killing John Fiorino. To that end, the dissidents allegedly imported alleged hit-man, Joseph John Sullivan, the person DiGiulio eventually fingered as the actual trigger man when Fiorino was shot and killed in the parking lot of the Blue Gardenia Restaurant in Irondequoit, a suburb of Rochester, on December 17, 1981.

Louis DiGiulio's testimony enfolded as follows: On December 14, 1981, DiGiulio was advised by Taylor that "Sully" was in town. "Sully" presumably was Joseph John Sullivan whom DiGiulio had met the immediately preceding winter in Taylor's company, and then again that summer at Taylor's cottage. DiGiulio was summoned to Taylor's apartment at approximately 6:00

p.m. on December 15, 1981, and instructed to find Sullivan at the Marriott on Ridge Road where he was registered under the name "Vic", and to deliver the message that Taylor and one Thomas Torpey [an alleged accomplice/dissident] would be there shortly. DiGiulio was admitted by Sullivan, and delivered his "message". Taylor and Torpey arrived at 7:30 p.m. Sullivan asked Taylor whether he had anything for him. According to DiGiulio, Taylor replied:[5] "Yes. There is two guys. One is the underboss, one is the captain." Taylor then gave a description of the captain which fit John Fiorino. Sullivan and DiGiulio were directed to make the rounds of the local bars. DiGiulio would go in alone to spot Fiorino. If Fiorino was found, Sullivan would then enter the bar and kill him. Taylor and Torpey were to remain on the street in a "crash car"—a second vehicle used to disrupt police pursuit in the event police arrived when Sullivan and DiGiulio were making their getaway.

Sullivan and DiGiulio allegedly stalked Fiorino through the night of December 15, 1981, but failed to locate him. Sullivan and DiGiulio met with Taylor and Torpey on the afternoon and evening of December 16, 1981. The following morning, Sullivan checked out of the Marriott and DiGiulio drove him to the Maple Leaf Motel. After checking in, Sullivan and DiGiulio drove downtown to join Taylor, Torpey, and Torpey's attorney, Charles West for lunch at Trebors. Taylor stated that he had been attempting to call Fiorino to arrange a meeting with him at Jason's Restaurant. According to DiGiulio, Fiorino was to be killed in the parking lot of Jason's. If Sullivan was unable to get a shot at him there, he was to enter the restaurant and wait until Taylor embraced a man—John Fiorino—and then shoot him. Attorney West

[5] 2nd Trial, Transcript, Vol. VI, pp. 435-440.

was not called by the prosecution to corroborate DiGiulio's testimony, although presumably he was privy to the same conversations DiGiulio allegedly overheard.

In late afternoon or early evening, Sullivan and DiGiulio joined Torpey and Taylor at Jason's. Fiorino was nowhere to be found. Taylor indicated that he had someone trying to locate Fiorino and that he would call them. Taylor directed Sullivan and DiGiulio to wait in DiGiulio's Cadillac. Taylor and Torpey finally emerged from Jason's and approached the Cadillac. Taylor tossed in a hat and gloves for DiGiulio and said "we better hurry up. Fiorino . . . John is going to be at the Blue at seven o'clock".[6]

Sullivan and DiGiulio proceeded to the parking lot of the Blue Gardenia Restaurant. Taylor's Thunderbird was parked beside the building in the fire lane. John Fiorino arrived, parked his vehicle, and was walking toward the entrance when Sullivan stepped out and fired two shots from a pump gun that killed him. DiGiulio drove the getaway car for Sullivan but lost control in the snow and sleet when Irondequoit police gave chase. DiGiulio was apprehended after a foot chase. Sullivan made good his getaway [although he was later picked up by the FBI].

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[6] 2nd Trial, Transcript, Vol. VI, pp. 473, 480.

THE TESTIMONY OF ROBERT HAWLEY: Robert Hawley was an inmate at the Yates County Jail in the autumn of 1982 when Louis DiGiulio and his brother were held there pending their admittance to the witness protection program after Louie cut his deal in June of 1982 to testify against Taylor, Torpey, and Sullivan. Hawley was a "trustee" and brought linens and food to the section of the jail where the brothers' DiGiulio were held. Eventually, Hawley befriended DiGiulo and spent time with him lifting weights. In early November of 1982, Hawley and DiGiulio were together when a news bulletin flashed across the screen of the DiGiulio's TV. The bulletin covered the arrest of ten reputed members of the Rochester mafia [including alleged boss, Red Russotti, consiglieri, Rene Piccaretto, and underboss, Richard Marino]. DiGiulo exclaimed "What did we kill . . . ., What did we kill him for, for these guys if they are all going to jail anyway. Apparently Fiorino wasn't the only canary around". DiGiulio said that "Fiorino talked too much" and that Taylor and Torpey were "peons. They had nothing to do with the killing of John Fiorino". DiGiulio confided in Hawley that he hated Torpey's guts and would like to kill him. He took the five year deal offered by the Prosecution and he hated Torpey. Taylor was an innocent victim of DiGiulio's plea bargain. Taylor had to be implicated "because that's the way it has to be"[7] DiGiulio emphasized that "he wasn't a rat and the right people that ran things here in Rochester knew he wasn't a rat".

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[7] 2nd Trial, Transcript, Vol. VIII, pp. 37-40.

Cross examination of Hawley by the Prosecution failed to dent Hawley's testimony. Hawley did have an alcohol related minor criminal record, but there was no question that he did not know any of the protagonists, Taylor and DiGiulio included, prior to his incarceration in the autumn of 1982 in the Yates County jail. There were Prosecution questions directed at the dates when Hawley and DiGiulio first conversed and when Hawley became a jail trustee [at incarceration, or after sentencing], and the jail layout and procedures, but there were no admissions nor third party testimony to impeach Hawley's testimony. Hawley's testimony then underscored the essential theory of Thomas Taylor's defense: John Fiorino was at the time of his death a police informant. He was killed not by the alleged dissidents, but rather on orders from the ruling faction of the Rochester mob to shut him up. Taylor and Torpey then were the convenient "fall guys" for the murder plot orchestrated by the Rochester mob. *It is absolutely essential for this Court to recognize that the testimony of Robert Hawley thoroughly contradicted and impeached the already dubious trial revelations of Louis DiGiulio, the Prosecution's star witness. Hawley's testimony then—other things being equal [which as we shall soon see, they were not]—blunted the thin circumstantial evidence case of the Prosecution and constituted the "reasonable doubt" that should have required the jury to acquit Thomas Taylor, and that in fact had hung the jury in the first trial and caused the mistrial.*

THE TESTIMONY OF LIDA FIORINO: Lida Fiorino, the wife of John Fiorino, testified that on the evening of December 17, 1981, between 6:00 and 6:30 p.m., her husband John received several phone calls. She was unable to discern the persons on the other end of the phone calls. Over defense objections, and contrary to the pre-trial agreement to abide by the evidentiary rulings in the first trial, Lida Fiorino stated that Thomas Taylor's nickname was "the eagle", and then testified that as her husband was leaving home "he said he was going to the Blue Gardenia to meet the Eagle and I was to tell Joe the Hop if he called."[8] Significantly, Lida Fiorino's trial testimony was a repudiation of her initial statements to the police. The report of Investigators Eisenhauer and Churnetski, filed on December 18, 1981, a copy of which is made a part of petitioner's appendix,[9] stated that they called on Mrs. Fiorino at her home at 78 Venice Circle within hours of the shooting to notify her of her husband's death. At that time, Lida Fiorino made no mention of telephone calls, nor of her husband's alleged intention to go to the Blue Gardenia to meet the Eagle. The investigators summarized their interview with Mrs. Fiorino, stating in their report: "According to Mrs. Fiorino her husband did not receive any phone calls just prior to him leaving the house nor did he tell her why he was going [to] that location". It was not until several months later [apparently March of 1982], that Mrs. Fiorino changed her story to implicate Thomas Taylor with the Blue Gardenia/Eagle reference. Even as so tainted, it was this testimony then—and this testimony

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[8] 2nd Trial, Transcript, Vol. VII, pp. 789-794.

[9] See Petitioner's appendix #3, #4, statements by investigating officers that made no mention of the conversation between Lida Fiorino and her husband, John, nor his alleged mention of meeting "the eagle".

alone—that principally corroborated the web woven by Louis DiGiulio, testimony fundamentally objectionable in point of law which should have been stricken by the trial justice. That he did not, apparently on the authority of the controversial *Hillmon* hearsay rule, in our view, presents a question of law which this Court in its discretion should review. For "but for" the testimony of Lida Fiorino, we respectfully submit there could not have been a conviction of Thomas Taylor.

HILLMON AND ITS PROGENY: THE TIME IS NOW FOR RECONSIDERATION: Lida Fiorino's testimony concerning the alleged statement made by her husband John before he left their home for his date with destiny was hearsay—not simply one step removed, but rather two steps removed. John Fiorino's statement that he was leaving to go to the Blue Gardenia to see the Eagle was an expression of his future intent. In addition, it could have been construed by the Jury as an indication of the intentions of Thomas Taylor, not only in allegedly contacting Fiorino to meet him at the Blue Gardenia [facts not in evidence], but also his ultimate participation in the alleged scheme to lure Fiorino to the Blue Gardenia and have him killed [likewise facts not in evidence when considered against the backdrop of DiGiulio's ambivalent disclosures—first denial, then cooperation and implicating Taylor, then repudiation in his disclosures to the witness Hawley].

Mutual Life Insurance Co. v. Hillmon, 145 U.S. 285 (1882), and *United States v. Pheaster*, 544 F.2d 353 (1976), cert. den. 429 U.S. 1099 (1977), represent the genesis and most frequently cited contemporary federal appellate court recapitulation of the double hearsay/state of mind rule relied upon by the trial justice in admitting

the testimony of Lida Fiorino. The efficacy of the *Hillmon* rule has been debated by legal scholars and courts in the hundred plus years since its initial articulation. Imwinkelreid, Giannelli, Gilligan, & Lederer, *Courtroom Criminal Evidence*, section 1212, at 301 states: "However, most of the recent cases consider the evidence incompetent hearsay for this purpose." And *Hillmon* significantly for the case at bar is anything but settled in the State of New York. It has been questioned in two recent Appellate Division opinions, emanating from the First Department. *People v. Malizia*, 92 A.D.2d 154 (1st Dept. 1983), aff'd 62 N.Y.2d 754 (1983), followed *Hillmon* and permitted the double hearsay/state of mind inference testimony. *People v. Chambers*, 125 A.D.2d 88 (1st Dept. 1987), app. dism'd. 70 N.Y.2d 694 (1987), mot. to vacate dismissal order den. 70 N.Y.2d 727 (1987), declined to follow *Hillmon* and rejected, we submit correctly, the double hearsay/state of mind inference testimony.

Both Federal and State Court decisions in other jurisdictions, including at least one opinion by this Court, have failed to find any common ground in the love/hate affair with *Hillmon*. Justice Cardozo, in *Shepard v. United States*, 290 U.S. 96, 105 (1933), questioned the propriety of the rule in a murder prosecution and wryly commented that *Hillmon* should be limited to "suits upon insurance policies". The Supreme Court of Errors of the State of Connecticut, in *State v. Perelli*, 125 Conn. 321, 5 A.2d 705, 707 (1939), in a murder prosecution, considered testimony of a wife who overheard a phone conversation between her husband and the defendants concerning her husband's alleged intention to see the defendants. "Those parts of the statements referring to the acts and intentions past and present, of the defendants were pure hearsay as to them, made by a person not subject to cross examination, and are not within the exception to the

hearsay rule . . . ." More recently, appeals courts in Illinois and Kentucky, in *People v. Reddock*, 13 Ill.App.3d 296, 300 N.E. 2d 31, 38 (2nd Dist. 1973), and *Scruggs v. Commonwealth*, 566 S.W.2d 405, 410 (Sup.Ct. Ky. 1978), declined to admit Hillmon hearsay testimony of third party intent in murder prosecutions.

Nor does there appear to be any consensus in Federal Circuit Court decisions considering the question. The Second Circuit in *United States v. Delvecchio*, 816 F.2d 859, 863 (2nd Cir. 1987), added its own limiting wrinkle to the *Hillmon* rule, holding that "A declarant's statement of intent may also be admitted against a non-declarant *when there is independent evidence* which connects the declarant's statement with the non-declarant's activities". (emphasis added) And even the Ninth Circuit, which rendered *United States v. Pheaster*, 544 F.2d 353 (9th Cir. 1976), the leading contemporary decision following *Hillmon*, seems to be taking a more cautionary approach with its opinion in *Terrovona v. Kincheloe*, 852 F.2d 424 (9th Cir. 1988), where *Hillmon* hearsay was admitted, but only where an incontrovertible piece of physical evidence—tire prints—and the admissions of the defendant, pointed to the same conclusion.

Rule 803(3) of the Federal Rules of Evidence is silent on the continued efficacy of *Hillmon*. The Advisory Committee on the Proposed Rules stated that "The rule of . . . *Hillmon* . . . allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed". Note to Paragraph (3), 28 U.S.C.A., at 585. However, the Notes of the House Committee on the Judiciary regarding Rule 803(3), provided emphatically that "the Committee intends that the rule be construed to limit the doctrine of . . . *Hillmon* . . . so as to render statements of intent by a declarant admissible only to prove his future conduct,

not the future conduct of another person." House Report No. 93-650, Note to Paragraph (3), 28 U.S.C.A. at 579.

Based upon the weight of authority, both commentary and case law, questioning the propriety of *Hillmon*, and given the result in the first prosecution, it is absolutely incomprehensible that the trial court adjudged the testimony of Lida Fiorino in any sense reliable. She did not get to it until nearly four months after her husband's death. Her initial statement to the police contained the direct disclaimer that there had been no calls or conversation with her husband before he left on the evening of December 17, 1981. She admitted that it was standard operating procedure for her husband to instruct her to deceive subsequent callers inquiring as to his whereabouts. Giving the Prosecution the benefit of every doubt, a rule of fair play that should have been extended to petitioner, his conviction was based on a tenuous line of circumstantial evidence. Given the direct and convincing impeachment of the informant DiGiulio's testimony by Robert Hawley, there was less than a scintilla of evidence speaking to the intent of John Fiorino on that fateful night, and an absolute void in the evidence concerning the intentions of the defendant Thomas Taylor. Unlike the recent Ninth Circuit decision in *Terrovona*, and the Second Circuit decision in *Delvecchio*, there was no independent reliable evidence pointing toward the same conclusion as Lida Fiorino's *Hillmon* hearsay. Lida Fiorino's testimony should therefore have been excluded.

In light of the split in the Federal and State appellate decisions, and the vital importance of the breadth of the *Hillmon* exception to the hearsay rule, especially in criminal cases built upon purely circumstantial evidence, the issue is now ripe for reconsideration, clarification, and determination by this Court.

II. Petitioner Was Deprived Of Exclusive, Effective, And Committed Representation Of Counsel.

Early on in the proceedings leading to the subject trial, the trial Justice was apprised of the fact that there was a serious conflict of interest building between appellant and Robert Murphy, Esq., the attorney who would represent appellant through the instant trial. Murphy was representing one Anthony Colombo, an accused murderer, and a defendant in a RICO prosecution of the entire top echelon of the alleged Rochester mafia, the very same organization allegedly at war with a dissident group of which petitioner was allegedly a key member. Apparently the possibility of the conflict was first soft-pedalled by the trial court on the assumption that the RICO prosecution would follow petitioner's trial. Quite the contrary occurred. The RICO case reached the trial calendar first, and the RICO trial was completed before petitioner's trial in the subject case. It would become part of Colombo's defense that Thomas Taylor, in the words of Robert Murphy, in summation, had furnished the gun used to kill Tom DiDio, one of the victims of the mob power struggle in Rochester that was the subject matter of the RICO prosecution. So blatant, basic, and debilitating did that conflict become, that the trial Justice eventually recognized that Robert Murphy could not and should not represent Thomas Taylor, and in essence so advised Murphy. Yet the fact of the trial Justice' conviction was kept from petitioner, who was inadequately advised of his circumstances and left to dangle in the wind with an attorney who had already publicly accused him of serious felonious conduct. Specifically, the trial Justice after the RICO trial called attorney Murphy into chambers without petitioner being present and expressed concern over Murphy's

statements about Taylor in defense of Anthony Colombo. Specifically, the trial Justice indicated that "It seems as though you didn't treat Mr. Taylor too kindly in those proceedings. That he was quite a bad man. In fact in your summation you said he was the one that furnished the gun".[10] Incredibly, the trial Justice then summoned Taylor into chambers and handed him part of the transcripts in the RICO case, asked him to carefully review them before making a decision on whether he would go forward with Murphy as his counsel, *but did not share with Taylor his expressed opinion that Murphy had already treated him badly*! That part of the chambers conference would be withheld until some time later when the transcription of the trial Justice' comments were finally delivered to Taylor on the eve of his trial. Nor did the Court call to petitioner's attention the cross examination of Louis DiGiulio by attorney Murphy in the RICO prosecution which included page after page of questions to the very same person who would be the key prosecution witness against Thomas Taylor in the instant homicide case based upon the repeated defense assertion that Thomas Taylor was directly or indirectly the responsible party for at least one of the homicides cited as a predicate act under the RICO Act. Initially Taylor elected to go forward with attorney Murphy. When he subsequently received the transcript of the trial Justice' comments and opinion, Taylor instructed Murphy to apply to withdraw. That application was denied,[11] as was a motion for a mistrial, and Taylor's *pro se* request for a continuance (after petitioner was finally given the opportunity to review the DiGiulio cross examination in the RICO prosecution during attorney

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[10] 2nd Trial, Transcript, Vol. I, 9/23/84, p. 2; Vol. I, 11/23/84, pp. 3-4.

[11] 2nd Trial, Transcript, Vol. VI, pp. 11-12; pp. 165-167.

Murphy's cross examination of DiGiulio in the instant homicide prosecution) for the purpose of finding new counsel.

The vital point here is that it was incumbent upon the trial Justice, once he learned of attorney Murphy's public conduct detrimental to his client Taylor's best interest, to relieve Murphy and afford Taylor a fair opportunity to find substitute counsel. Significantly, in the same time period, when attorney Murphy's inculpatory and derogatory comments concerning his client, the petitioner, in the Colombo RICO prosecution were called to the attention of Federal District Court Judge Michael Telesca who was to preside over a Federal prosecution of petitioner on charges of conspiracy to distribute narcotics, Judge Telesca, within a month of the scheduled trial date in the narcotics case, summarily relieved attorney Murphy and appointed another attorney for petitioner.

Given attorney Murphy's statements and the trial Justice's perception of their import, it was not enough that the petitioner be inadequately advised of his circumstances and then left to his own devices. In the interest of justice and to insure that the defendant would receive unequivocally loyal and singularly committed representation, it was the duty of the trial Justice to intervene and relieve Mr. Murphy. Even a Justice of the Appellate Division appeared to misperceive the issue in asking during argument whether Taylor was free on bail at the time—presumably free to find another attorney.

The Sixth Amendment Right to Counsel in so blatant a situation required judicial intervention. As this Court stated in *Strickland v. United States*, 466 U.S. 668, (1984), "In *Cuyler v. Sullivan*, 446 U.S. 335 (1980), the

Court held that *prejudice is presumed* when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. Given the obligation of counsel to avoid conflicts of interest and the ability of trial courts to make early inquiry in certain situations likely to give rise to conflicts, see, *e.g.*, Fed.Rule Crim. Proc. 44(c), it is reasonable for the criminal justice system to maintain *a fairly rigid rule of presumed prejudice for conflicts of interest.*" (emphasis added)

The primary rule of legal ethics governing the attorney/client relationship is that the lawyer is duty bound both to his client and to the legal system to represent his client zealously within the bounds of the law [N.Y. Code of Professional Responsibility, EC 7-1]; and in such a way that he does not prejudice or damage his client during the course of the professional relationship [N.Y. Code of Professional Responsibility DR 5-101(A), DR 5-105(A), DR 7-101(A) (3)]; and complete loyalty to a client is essential ["the overarching duty" of a lawyer to his or her client—*Burger v. Kemp*, 483, 97 L.Ed. 2d 638 (1987)].

In the instant case, counsel (Mr. Murphy) was representing petitioner and a defendant in the RICO case (Colombo) simultaneously, one in Federal Court a block or two away from the other in State Court. In the Federal Colombo case, Murphy stated on summation that Sullivan (the same Sullivan accused of being the hit-man who shot John Fiorino in the instant prosecution), was using a weapon which belonged to Taylor, and posed several questions to the witness Oliveri on cross

examination attempting to convince the jury that petitioner was the real culprit, and not Colombo, his federal client. This is the "why" of the Trial Justice's statement outside petitioner's presence that he did not believe Murphy had treated his client (Taylor) "kindly". It is, we submit on petitioner's behalf, absolutely unconscionable and impermissible for the profession and for the legal system to have the same lawyer in highly publicized cases paint his client as villain in one Court and as victim in another Court, all from the same bucket of facts. This is exactly the reason why Chief Justice Rehnquist in *Wheat v. United States*, 486 U.S. 153, (1988), made it absolutely clear that the Trial Justice in a multiple defendant conflict case must do more than passively, in a sense, call the potential problem to the defendant's attention. ". . .(T)rial courts, when alerted by objection from one of the parties, have an independent duty to ensure that criminal defendants receive a trial that is fair and does not contravene the Sixth Amendment". While *Wheat* involved co-defendants in the same prosecution, it would seem a logical and, in fact, compelling constitutional extension to apply its rationale to independent simultaneous prosecutions involving some of the same parties and/or key witnesses.

It is therefore incumbent on the Trial Justice to make an affirmative inquiry and determination of the facts and circumstances of the conflict, and to take measures adequate under the circumstances to insure that the conflict will not prejudice the defendant so as to deprive him of a fair trial—most often "an order by the court that the defendants be separately represented in subsequent proceedings in the case". See also, to the same effect, *Glasser v. United States*, 315 U.S. 60 (1942), and *Holloway v. Arkansas*, 435 U.S. 475 (1978).

In the instant case, the highest standards of professional responsibility fell by the wayside in the Trial Justice's unaccountable determination to rush the petitioner to judgment after initially correctly identifying the fatal conflict of interest between the petitioner and Mr. Murphy. If the Sixth Amendment right to counsel of one's choosing is to have any meaning, petitioner was entitled to a continuance and independent counsel once he learned that Mr. Murphy's conduct had in fact been castigated by the Trial Justice in the Chambers conference (only part of which was open to petitioner), all of which was not disclosed to petitioner by reason of the Court's deliberate, or at the very minimum, well nigh cavalier withholding of that information until the eve of trial.

The fundamental conflict between petitioner and his counsel was unconscionable, inexcusable, and presumptively prejudicial. That the trial Justice failed in his duty to mitigate and resolve the conflict he early on recognized denied petitioner his constitutional right to effective representation and a fair trial, and is, we submit, reversible error and sufficient cause for the intervention of this Court.

CONCLUSION

For the foregoing reasons, it is respectfully submitted on petitioner's behalf that this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

FRANK A. ALOI, ESQ.
Attorney for Petitioner
2507 Browncroft Blvd.
Suite 202
Rochester, New York 14625
(716) 381-5310
(716) 624-3932

SAMUEL F. PRATO, ESQ.
Co-Counsel for Petitioner
80 St. Paul Street
Suite 531
Rochester, New York 14604
(716) 325-5900

PETITIONER'S APPENDIX 1

Opinion of N.Y. Sup. Ct. Appellate Division

* * *

1476. (Monroe Co.)—People of the State of New York Respondent, v Thomas E. Taylor, Appellant.—Judgment unanimously affirmed. Memorandum: The Court did not err in denying defendant's motion for a mistrial based on conflict of interest between defendant and his retained counsel. The motion was made after nearly one month of jury selection and just before opening statements were scheduled. The record reflects knowing waiver of any conflict on two occasions, eight months and three months earlier (*see*, People v Caban, 70 NY2d 695).

We have considered the other claims made by defendant and find that none has merit. (Appeal from Judgment of Supreme Court, Monroe County, Kennedy, J. - Murder, 2nd degree.)

Present: Dillon, P.J., Callahan, Green, Pine, Davis, JJ.

* * *

PETITIONER'S APPENDIX 2

STATE OF NEW YORK

COURT OF APPEALS

BEFORE: HON. STEWART F. HANCOCK, JR.,
Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,

against

THOMAS E. TAYLOR,
Appellant.

CERTIFICATE DENYING LEAVE

I, STEWART F. HANCOCK, JR., Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Manlius, New York
January 24, 1990

STEWART F. HANCOCK, JR.
Associate Judge

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* Description of Order: Order of the Appellate Division, Fourth Department of November 15, 1989 affirming a judgment of Supreme Court, Monroe County entered April 9, 1985

PETITIONER'S APPENDIX 3
Lida Fiorino Testimony in first Trial

MR. LAPINE: Same with respect to Mr. Torpey, no cross-examination.

THE COURT: All right, Mr. Bookless is excused.

Thank you, Mr. Balter.

(THE WITNESS WAS EXCUSED.)

MR. CASTRO: Lita Fiorino.

LITA FIORINO, called herein as a witness, on behalf of The People of the State of New York, first being duly sworn, testified as follows:

DIRECT-EXAMINATION BY MR. CASTRO:

Q. Good afternoon, Mrs. Fiorino. Did you know John Fiorino? A. Yes, I did.

Q. And what was your relation to him, if any? A. He was my husband.

Q. Would you tell us how long you were married? A. Two years.

Q. And would you tell us what those years were? A. Pardon?

Q. What time does that encompass? A. 1980, 1979, and 19—

MR. LAPINE: I'm sorry, I can't hear.

THE COURT: Would you speak up, Mrs. Fiorino?

* * *

A. No.

MR. LAPINE: Objection, leading question.

THE COURT: Sustained.

Q. Can you tell us whether or not you and your husband had any plans to go out that evening? A. No.

Q. Can you tell us, what was the next thing that happened? A. He made a couple phone calls, he received a couple phone calls.

Q. And when did those phone calls begin?

MR. SPERANZA: Excuse me, Mr. Castro.
Excuse me, Mrs. Fiorino.
Your Honor, may I first have that last question and answer read back? I didn't hear it.

THE COURT: Read back.

(The last question and answer were read back by the court reporter.)

MR. SPERANZA: Thank you.

THE COURT: Mrs. Fiorino, could you keep your voice up, please, so the attorneys can hear you?

WITNESS FIORINO: All right.

Q. Can you tell us when that began, about what time? A. About six o'clock.

Q. Do you know whether he made or received that first phone call? A. I think he made the first phone call.

Q. Did you overhear any of the conversation on that phone call? Can you tell us, what was—not what was said, but I am asking whether or not you overheard any of it? A. It was just a friendly conversation.

Q. Thereafter, did he receive any further phone calls? A. Yes.

Q. And can you give us the approximate time when he received those phone calls? A. It was between 6:00 and 6:15.

MR. LAPINE: Excuse me. I object.

I am having difficulty hearing you too, Mr. Castro. Was it that she made phone calls or that he made phone calls?

MR. CASTRO: No, that he received.

Q. Did your husband, John Fiorino, receive phone calls thereafter? A. Yes.

Q. At about what time? A. Between 6:00 and 6:15.

Q. Did you overhear any of the conversations of those phone calls? A. No.

Q. Can you tell us the approximate time of when the last phone call ended? A. About 6:15 was the last one.

Q. What happened next? A. He got up and went to the bedroom, put some clothes on, came out and told me where he was going.

Q. Did you say anything to him? A. Okay.

Q. Can you give us an estimate of when he left your home? A. About twenty, twenty-five after.

Q. Mrs. Fiorino, can you tell us how it is that you are gauging these times that you have given us? A. Because it was such a short span of time that all this was happening.

Q. I will next direct your attention to the period between quarter of seven and ten to seven. Did you receive any telephone calls, at that point in time? A. Yes.

Q. Did you pick up the phone yourself?

* * *

A. Minute.

Q. Thereafter, did there come a time when you received a third phone call? A. Yes.

Q. And do you recall how long you talked to that person? A. Short time.

Q. Can you tell us what happened thereafter? A. After what?

Q. After that last phone call, what happened next? A. I don't understand.

Q. Let me go back one step. Can you tell us where your husband—just tell us only where your husband told you he was going, not with whom or what, but just where your husband told you he was going?

MR. SPERANZA: Objection, Your Honor, it's hearsay.

MR. LAPINE: Same objection.

THE COURT: It's overruled.

Q. What place was he going to? A. Blue Gardenia.

Q. Now, after these three phone calls that you received, what was the next thing that happened that you remember? A. The police came to the house.

Lida Fiorino interviewed by Eisenhauer and Churnetski 12/18/81

with we have 3 pages

LEMENT REPORT

DEPT. NAME Irondequoit Police Dept. PAGE 10 OF 14

P.D. REV. 7/70 CR-1011

THIS BOX FOR OFFICE USE ONLY

FROM COPIES TO BE MADE →

— TICKLER

— EVIDENCE ROOM BE SURE TO INCLUDE A SCRODE COPY TO THE EVIDENCE ROOM ON ALL BURGLARY REPORTS

1. ☐ FORM USED AS CONTINUATION SHEET FOR CURRENT INCIDENT REPORT ☐ FORM USED TO REPORT FOLLOW UP INVESTIGATION.

2. CR. NO. (ORIGINAL CASE) 58866

3. CHECK ONE AND ENTER NAME → ☐ ARRESTEE ☐ COMPLAINANT ☐ DRIVER ☐ VICTIM ☐ WITNESS

4. OFFENSE OR CHARGE (REVIEW OFF. CLASSIFICATION FROM ORIGINAL REPORT) ☐ UNFOUNDED

5. CLASSIFICATION OF OFFENSE (AFTER INVESTIGATION)

6. STATUS FOR BOX 5 ☐ CLEARED ☐ UNFOUNDED ☐ NOT CLEARED ☐ ADM. CLOSING

7. ARE ALL PERSONS INVOLVED UNDER 18 YRS. OLD ☐ YES ☐ NO

8. MULTIPLE CLEAR-UP ☐ YES ☐ NO LIST OTHER C.R. NO'S IN NARRATIVE, MAKE OUT A NEW SUPPLEMENT FORM FOR EACH CLEAR-UP.

9. PROP. RECOVERED ☐ YES $ ☐ NO

10. PROP. INVENTORY ☐ YES # ☐ NO

11. EVIDENCE TECHNICIAN REPORT ☐ YES ☐ NO ☐ PHOTO ☐ F. PRINT ☐ I.D. KIT ☐ OTHER

TION OF ORIGINAL INCIDENT | 13. DATE OF ORIGINAL REPORT TIME | 14. IF PROPERTY CRIME, NAME OF ESTABLISHMENT

STRUCTIONS FOR FOLLOW-UP & SUPPLEMENTAL USAGE: UNDER NARRATIVE, RECORD ALL DEVELOPMENTS IN THE CASE SUBSEQUENT TO LAST REPORT. DESCRIBE AND RECORD VALUE OF ANY PROPERTY RECOVERED. LIST NAMES OF PERSONS ARRESTED. EXPLAIN ANY OFFENSE CLASSIFICATION CHANGE. CLEARLY SHOW DISPOSITION OF RECOVERED PROPERTY AND INVENTORY NO.

ARR. ☐ YES ☐ NO | 17. WORKING CR. NO. ☐ YES # ☐ NO

18. NARRATIVE:

After departed the crime scene reporting officers responded to 78 Venice Cir, the home of the deceased, to notify the immediate family. After our arrival reporting officers spoke with the victim's wife Lida Fiorino DOB: 11-18-49 and made the notify of her husband's death. During the brief conversation with Mrs. Fiorino that followed it was ascertained that the victim left his home at about 6:30P on 12-17-81 and he only told his wife that he was stopping at the Blue-Gardenia andthat he would be back in a short while. That was the last time Mrs. Fiorino spoke with her husband. According to Mrs. Fiorino her husband did not receive any phone calls just prior to him leaving the house nor did he tell her why he was going that that locatir

Before Leaving the area these reporting officers spoke with Richard Marino at 68 Venice Cir. He could not say why Mr. Fiorino went to the Blue-Gardenia Rest. and stated that he had not seen him all day long.

but sd [illegible] 778 (40) and J.J. 715

Mr. Fiorino home w/ family excellent char.

WERE REPORT ITEMS OF FOLLOW-UP CONDUCTED: | 20. TECHNICIAN'S NAME IF CALLED IF NOT GIVE REASON

12-19-81 | 22. REPORTING OFF. (CM'S NAME) Inv's Eisenhauer/Churnetski | 23. SUPERVISOR APPROVING

CENTRAL RECORDS

POLICE REPORT (EISENHAUER & CHURNETSKI)

PETITIONER'S APPENDIX 4
Lida Fiorino Police Statements
Not mentioning "eagle"

7a

12482-076

(2)

City of Rochester

INTER-DEPARTMENTAL CORRESPONDENCE

TO: Sgt. John Grande

FROM: Inv. Ronald Giacobbe

DATE: 3/3/82

SUBJECT: Mrs John Fiorino, 78 Venice Circle.

Sir,

On 3/3/82, at approx. 1005hrs, reporting investigator and Sgt. John Grande, interviewed Mrs. John Fiorino at her residence, 78 Venice Circle. The sum and substance of the interview is as follows. Mrs. Fiorino stated that on Dec. 17,1981 the date of her husbands (John Fiorino) homicide, John Fiorino arrived home from a party at approx. 5:45PM. From that time to the time he left home, John recieved about three phone calls and made at least one outgoing phone call. Mrs. Fiorino further stated that, after recieving the phone calls, John told her that he would be right back, and he left the house. John was wearing casual clothing, he had changed his clothes upon arriving home at approx. 5:45PM. Mrs Fiorino stated that she did not know her husband had taken the gun with him and that he did not normal carry the gun. At this time Mrs Fiorino indicated that she was unsure if she should continue the interview without consulting her attorney Mr. Philip Scardino, phone number 546-6341. The interview was terminat and Sgt. Grande suggested that Mr. Scardino and ADA Mel Castro discuss the possibility of the continuation of the interview in the presence or approval of Mr. Scardino. ~~Mrs Scardino~~ indicated that she would be receptive to that course of action.
Sgt. Grande and Inv. Giacobbe advised Mr.Castro of the aforementioned and he contacted Mr. Scardino to further the arrangements for the interview.

Respectfully submitted

Inv. Ronald Giacobbe

POLICE REPORT (GIACOBBE)

PETITIONER'S APPENDIX 4 9a
Lida Fiorino Police Statements
Not mentioning "eagle"